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SENATE BILL 305

**48TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2008**

INTRODUCED BY

Joseph J. Carraro

AN ACT

RELATING TO HEALTH RECORDS; CREATING THE ELECTRONIC MEDICAL RECORDS ACT; AUTHORIZING THE CREATION, MAINTENANCE AND USE OF ELECTRONIC MEDICAL RECORDS; PROVIDING FOR INDIVIDUAL RIGHTS WITH RESPECT TO THE DISCLOSURE OF INFORMATION CONTAINED IN ELECTRONIC MEDICAL RECORDS; PROVIDING FOR THE PROTECTION OF PRIVACY OF ELECTRONIC MEDICAL RECORDS; CREATING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the "Electronic Medical Records Act".

Section 2. PURPOSE.--The purpose of the Electronic Medical Records Act is to provide for the implementation, maintenance, use and protection of electronic medical records.

Section 3. DEFINITIONS.--As used in the Electronic Medical Records Act:

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1           A. "authorization" means a document that meets the  
2 requirements of a valid authorization under 45 C.F.R. Section  
3 164.508(b);

4           B. "business associate" means a person acting as a  
5 business associate in accordance with the provisions of 45  
6 C.F.R. Sections 160.103 and 164.502(e)(1);

7           C. "demographic information" means information in a  
8 medical record that identifies the individual that is the  
9 subject of the medical record, including the individual's name,  
10 date of birth, address and other information that identifies  
11 the individual; that may be used to identify the individual; or  
12 that associates the individual with the individual's medical  
13 record;

14           D. "disclosure" means the release, transfer,  
15 provision or otherwise divulging of an individual's medical  
16 records to a person other than the holder of the records and  
17 includes having access to those records;

18           E. "electronic" means relating to technology having  
19 electrical, digital, magnetic, wireless, optical,  
20 electromagnetic or similar capabilities;

21           F. "electronic medical record" means a medical  
22 record created, generated, sent, communicated, received or  
23 stored by electronic means;

24           G. "electronic signature" means an electronic  
25 sound, symbol or process attached to or logically associated

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1 with a record and executed or adopted by an individual with the  
2 intent to sign the record;

3 H. "health care" means care, services or supplies  
4 related to the health of an individual and includes:

5 (1) preventive, diagnostic, therapeutic,  
6 rehabilitative, maintenance or palliative care and counseling;

7 (2) service, assessment or procedure with  
8 respect to the physical or mental condition or functional  
9 status of an individual or that affects the structure or  
10 function of the body; and

11 (3) the sale or dispensing of a drug, a  
12 device, a piece of equipment or other item in accordance with a  
13 prescription;

14 I. "health care group purchaser" means a person  
15 licensed, certified or otherwise authorized or permitted by law  
16 to pay for or purchase health care on behalf of an identified  
17 group of individuals, regardless of whether the cost of  
18 coverage or services is paid for by the purchaser or the  
19 persons receiving coverage or services;

20 J. "health care information" means any information,  
21 whether oral or recorded in any form or medium, related to the  
22 past, present or future physical or mental health or condition  
23 of an individual; the provision of health care to an  
24 individual; or the past, present or future payment for the  
25 provision of health care to an individual;

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1           K. "health care institution" means an institution,  
2 facility or agency licensed, certified or otherwise authorized  
3 or permitted by law to provide health care in the ordinary  
4 course of business;

5           L. "health care provider" means an individual  
6 licensed, certified or otherwise authorized or permitted by law  
7 to provide health care in the ordinary course of business or  
8 practice of a profession;

9           M. "health information exchange" means an  
10 arrangement among persons providing for the disclosure of  
11 electronic medical records;

12           N. "individually identifiable health information"  
13 means health care information that is created or received by a  
14 health care provider, health care institution or group health  
15 care purchaser:

16                   (1) that identifies the individual that is  
17 the subject of the health care information; or

18                   (2) with respect to which there is a  
19 reasonable basis to believe that the information can be used to  
20 identify the individual that is the subject of the health care  
21 information;

22           O. "information" means data, including text,  
23 images, sounds and codes and computer programs, software and  
24 databases;

25           P. "medical emergency" means a situation or

1 condition that requires medically necessary health care  
2 immediately to preserve life, to prevent serious impairment to  
3 bodily functions, organs or parts or to prevent placing the  
4 physical or mental health of an individual in serious jeopardy;

5 Q. "medical record" means a record of health care  
6 information, including records of the disclosure of information  
7 in the medical record;

8 R. "record" means information that is inscribed on  
9 a tangible medium or that is stored in an electronic or other  
10 medium and is retrievable in perceivable form;

11 S. "record locator service" means a system that  
12 provides a means of identification of the existence of and  
13 location of the electronic medical records of a specified  
14 individual; and

15 T. "related health care entity" means an affiliate  
16 of a health care provider or health care institution disclosing  
17 the information. As used in this subsection, "affiliate" means  
18 an entity that controls, is controlled by or is under common  
19 control with another entity.

20 Section 4. IMPLEMENTATION PLAN FOR ELECTRONIC CLAIMS AND  
21 BILLING.--

22 A. The New Mexico telehealth and health information  
23 technology commission, no later than June 1, 2009, shall  
24 develop an implementation plan for all health care providers  
25 and health care institutions doing business in New Mexico to

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1 migrate to the use of electronic claims and bills and all  
2 health care group purchasers doing business in New Mexico to  
3 migrate to the use of electronic claims processing and  
4 remittance. The plan shall be based on research, best  
5 practices, the use of standard forms and processes, national  
6 standards and a realistic assessment of the cost of the  
7 migration to health care providers, health care institutions  
8 and health care group purchasers and of their readiness to make  
9 the migration to the use of electronic claims, bills and  
10 remittances.

11 B. The implementation plan shall be presented to  
12 the department of health by July 1, 2009. After evaluation and  
13 consultation, the department, together with the New Mexico  
14 telehealth and health information technology commission, shall  
15 make recommendations to the governor and the legislature  
16 regarding specific legislation or appropriations for  
17 implementation of the plan.

18 Section 5. IMPLEMENTATION PLAN FOR ELECTRONIC MEDICAL  
19 RECORDS.--

20 A. The New Mexico telehealth and health information  
21 technology commission, no later than June 1, 2010, shall  
22 develop an implementation plan for all health care providers  
23 and health care institutions doing business in New Mexico and  
24 all health care group purchasers doing business in New Mexico  
25 to migrate to the use of electronic medical records systems and

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1 the exchange of electronic health information. The plan shall  
2 be based on research, best practices, the use of standard  
3 definitions and protocols, national standards and a realistic  
4 assessment of the cost of the migration to health care  
5 providers, health care institutions and health care group  
6 purchasers and of their readiness to make the migration to the  
7 use of electronic medical records systems and the exchange of  
8 electronic health information.

9 B. The implementation plan shall be presented to  
10 the department of health by July 1, 2010. After evaluation and  
11 consultation, the department, together with the New Mexico  
12 telehealth and health information technology commission, shall  
13 make recommendations to the governor and the legislature  
14 regarding specific legislation or appropriations for  
15 implementation of the plan.

16 Section 6. ELECTRONIC RECORDS--ELECTRONIC SIGNATURES--  
17 LEGAL RECOGNITION.--

18 A. A medical record or a signature pertaining to a  
19 medical record shall not be denied legal effect solely because  
20 it is in electronic form.

21 B. If a law requires a medical record to be in  
22 writing, an electronic medical record satisfies that law.

23 C. If a law requires a signature pertaining to a  
24 medical record, an electronic signature satisfies that law.

25 Section 7. ATTRIBUTION AND EFFECT OF ELECTRONIC MEDICAL

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1 RECORDS AND ELECTRONIC SIGNATURES.--

2 A. An electronic medical record or an electronic  
3 signature pertaining to a medical record is attributable to an  
4 individual if it was the act of that individual. The act of  
5 that individual may be shown in any manner, including a showing  
6 of the efficacy of any security procedure applied to determine  
7 the individual to whom the electronic medical record or the  
8 electronic signature pertaining to the medical record was  
9 attributable.

10 B. The effect of an electronic medical record or an  
11 electronic signature pertaining to a medical record attributed  
12 to an individual under Subsection A of this section is  
13 determined from the context and surrounding circumstances at  
14 the time of its creation, execution or adoption and as  
15 otherwise provided by law.

16 Section 8. NOTARIZATION AND ACKNOWLEDGMENT.--If a law  
17 requires a medical record or a signature pertaining to a  
18 medical record to be notarized, acknowledged, verified or made  
19 under oath, the requirement is satisfied if the electronic  
20 signature of the person authorized to perform those acts,  
21 together with all other information required to be included by  
22 other applicable law, is attached to or logically associated  
23 with the medical record or with the signature pertaining to the  
24 medical record.

25 Section 9. RETENTION OF ELECTRONIC MEDICAL RECORDS.--

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1           A. If a law requires that a medical record be  
2 retained, the requirement is satisfied by retaining an  
3 electronic record of the information in the medical record  
4 that:

5                   (1) accurately reflects the information set  
6 forth in the medical record after it was first generated in its  
7 final form as an electronic medical record or otherwise; and

8                   (2) remains accessible and is capable of  
9 being accurately reproduced for later reference.

10           B. A requirement to retain a medical record in  
11 accordance with Subsection A of this section does not apply to  
12 any information the sole purpose of which is to enable the  
13 medical record to be sent, communicated or received.

14           C. A person may satisfy Subsection A of this  
15 section by using the services of another person if the  
16 requirements of that subsection are satisfied.

17           D. If a law requires a medical record to be  
18 presented or retained in its original form or provides  
19 consequences if the medical record is not presented or retained  
20 in its original form, that law is satisfied by an electronic  
21 medical record retained in accordance with Subsection A of this  
22 section.

23           E. A medical record retained as an electronic  
24 medical record in accordance with Subsection A of this section  
25 satisfies a law requiring a person to retain a medical record

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1 for evidentiary, audit or other purposes, unless a law enacted  
2 after the effective date of the Electronic Medical Records Act  
3 specifically prohibits the use of an electronic medical record  
4 for the specified purpose.

5 Section 10. ADMISSIBILITY AS EVIDENCE.--In an evidentiary  
6 proceeding, evidence of a medical record or of a signature  
7 pertaining to a medical record shall not be excluded solely  
8 because it is in electronic form.

9 Section 11. DISCLOSURE OF HEALTH CARE INFORMATION.--

10 A. A health care provider, health care institution  
11 or health care group purchaser shall not disclose health care  
12 information in an individual's medical record to another person  
13 without:

- 14 (1) an authorization from the individual;  
15 (2) specific authorization in law; or  
16 (3) a representation from a health care  
17 provider, health care institution or health care group  
18 purchaser that it holds an authorization from the individual  
19 authorizing the disclosure.

20 B. Health care information in an individual's  
21 medical record, the pertinent portion of a medical record  
22 relating to a specific condition or a summary of the medical  
23 record shall promptly be furnished to another health care  
24 provider, health care institution or health care group  
25 purchaser upon the written request of the individual. The

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1 written request shall specify the name of the health care  
2 provider, health care institution or health care group  
3 purchaser to whom the medical record is to be furnished. The  
4 health care provider, health care institution or health care  
5 group purchaser that furnishes the medical record or summary  
6 may retain a record of the information furnished. The  
7 individual shall be responsible for the reasonable costs  
8 incurred by the health care provider, health care institution  
9 or health care group purchaser in furnishing the health care  
10 information.

11 C. An authorization to disclose medical records is  
12 valid for one year or for a lesser period specified in the  
13 authorization unless:

14 (1) a different period is provided by law;  
15 (2) the disclosure of information in a medical  
16 record is to a health care provider that is being advised or  
17 consulted with in connection with the disclosing health care  
18 provider's or health care institution's current treatment of  
19 the individual and a longer period of time is necessary; or

20 (3) the disclosure of information in a medical  
21 record is to a health care group purchaser or third-party  
22 administrator for purposes of payment of claims, fraud  
23 investigation or quality of care review and studies and a  
24 longer period of time is necessary; provided that:

25 (a) further use or disclosure of the

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1 individually identifiable health information in the medical  
2 record to a person other than the individual without the  
3 individual's consent is prohibited; and

4 (b) the recipient establishes adequate  
5 safeguards to protect the health care information from  
6 unauthorized disclosure, including a procedure for removal or  
7 destruction of demographic information.

8 D. This section does not prohibit the disclosure by  
9 a health care provider, health care institution or health care  
10 group purchaser of information in an individual's medical  
11 record:

12 (1) for treatment of an individual in a  
13 medical emergency when the health care provider or health care  
14 institution is unable to obtain the individual's authorization  
15 due to the individual's condition or the nature of the medical  
16 emergency;

17 (2) to other health care providers within the  
18 same or related health care entities when necessary for the  
19 current treatment of the individual;

20 (3) to a business associate;

21 (4) in the form of a limited data set in  
22 accordance with the requirements of 45 C.F.R. Section  
23 164.514(e); or

24 (5) in a form that meets the standard and  
25 implementation specifications for de-identification under 45

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1 C.F.R Sections 164.514(a) and (b).

2 E. A health care provider, health care institution  
3 or health care group purchaser may disclose demographic  
4 information and information about the location of an  
5 individual's medical records to a record locator service  
6 without authorization from the individual, unless the  
7 individual has elected to be excluded from the record locator  
8 service under Subsection H of this section. Except in the case  
9 of a medical emergency, a health care provider, health care  
10 institution or health care group purchaser participating in a  
11 health information exchange using a record locator service  
12 shall not have access to demographic information and  
13 information about the location of the individual's medical  
14 records without the individual's authorization for the access.

15 F. A health information exchange maintaining a  
16 record locator service shall maintain an audit log of health  
17 care providers, health care institutions and health care group  
18 purchasers accessing information in the record locator service  
19 that at least contains information on:

20 (1) the identity of the health care provider,  
21 health care institution or health care group purchaser  
22 accessing the information;

23 (2) the identity of the individual whose  
24 information was accessed by the health care provider, health  
25 care institution or health care group purchaser; and

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1 (3) the date the information was accessed.

2 G. A health care group purchaser shall not require  
3 a health care provider or health care institution to  
4 participate in a record locator service as a condition of  
5 payment or participation.

6 H. A person operating a record locator service or  
7 health information exchange shall provide a mechanism under  
8 which individuals may exclude their demographic information and  
9 information about the location of their medical records from  
10 the record locator service. At a minimum, an authorization  
11 form that permits a health care provider, health care  
12 institution or health care group purchaser to access a record  
13 locator service shall include a conspicuous check-box option  
14 that allows an individual to exclude all of the individual's  
15 information from the record locator service. A health care  
16 provider, health care institution or health care group  
17 purchaser that participates in a health information exchange  
18 with a record locator service and that receives an individual's  
19 request to exclude all of the individual's information from the  
20 record locator service or to have a specific health care  
21 provider, health care institution or health care group  
22 purchaser excluded from using the record locator service to  
23 access that individual's information is responsible for  
24 removing that information from the record locator service.

25 I. In cases where a health care provider, health

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1 care institution or health care group purchaser discloses  
2 information in an individual's medical record without the  
3 individual's authorization, the disclosure shall be documented  
4 in the individual's medical record.

5 J. When individually identifiable health  
6 information is disclosed using a representation from a health  
7 care provider, health care institution or health care group  
8 purchaser that holds an authorization from the individual, the  
9 disclosing health care provider, health care institution or  
10 health care group purchaser shall document:

11 (1) the health care provider, health care  
12 institution or health care group purchaser requesting the  
13 information;

14 (2) the identity of the individual;

15 (3) the information in the medical record  
16 requested; and

17 (4) the date the information was requested.

18 K. When requesting information in a medical record  
19 using an authorization, or a representation of holding an  
20 authorization, a person, health care provider, health care  
21 institution or health care group purchaser warrants that the  
22 request:

23 (1) contains no information known to the  
24 person, health care provider, health care institution or health  
25 care group purchaser to be false;

1 (2) accurately states the individual's desire  
2 to have information in the individual's medical record  
3 disclosed or that there is specific authorization in law for  
4 the disclosure; and

5 (3) does not exceed any limits imposed by the  
6 individual in the authorization.

7 L. When requesting information in an individual's  
8 medical record in a medical emergency without an authorization  
9 from that individual, the requesting person shall warrant the  
10 existence of a medical emergency, in which case a person  
11 releasing the information may rely upon the warranty of the  
12 person making the request that a medical emergency exists.

13 M. When disclosing information in an individual's  
14 medical record, a person releasing such information warrants  
15 that the person:

16 (1) has complied with the requirements of this  
17 section regarding disclosure of medical records;

18 (2) knows of no information related to the  
19 request that is false; and

20 (3) has complied with any limits set by the  
21 individual in the authorization.

22 Section 12. OUT-OF-STATE DISCLOSURES.--A disclosure  
23 otherwise permissible under the Electronic Medical Records Act  
24 may be made to persons, health care providers, health care  
25 institutions, health care group purchasers or record locator

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1 services located or operating outside the state.

2 Section 13. HEALTH CARE REPRESENTATIVES.--

3 A. A person authorized to consent to health care  
4 for an individual may exercise the rights and powers of that  
5 individual under the Electronic Medical Records Act, consistent  
6 with that authority. If an individual is a minor and is  
7 authorized by law to consent to health care without parental  
8 consent, the minor and not the parent of the minor may exercise  
9 the rights and powers related to the information in the minor's  
10 medical record under the Electronic Medical Records Act.

11 B. A person exercising authority to act for an  
12 individual under the Electronic Medical Records Act shall act  
13 in good faith to represent the best interests of the  
14 individual.

15 C. A health care provider, health care institution  
16 or health care group purchaser is not subject to regulatory or  
17 disciplinary actions or civil liability for:

18 (1) complying with a request or authorization  
19 made by a person apparently having authority to exercise the  
20 rights and powers of an individual under the Electronic Medical  
21 Records Act; or

22 (2) declining to comply with a request or  
23 authorization made by a person based on a belief that the  
24 person lacked authority to exercise the rights and powers of an  
25 individual under the Electronic Medical Records Act.

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1           Section 14. DISCLOSURE OF MEDICAL RECORDS FOR RESEARCH.--  
2 Notwithstanding the provisions of Section 11 of the Electronic  
3 Medical Records Act, information in an individual's medical  
4 record may be disclosed by a health care provider, health care  
5 institution or health care group purchaser to a researcher  
6 solely for purposes of medical or scientific research in  
7 accordance with the provisions of 45 C.F.R. Section 164.512(i).

8           Section 15. PENALTIES.--

9           A. A violation of any provision of the Electronic  
10 Medical Records Act may be grounds for regulatory or  
11 disciplinary action against a health care provider, health care  
12 institution or health care group purchaser by the appropriate  
13 licensing board or regulatory agency.

14           B. A person is liable to an individual for  
15 compensatory damages caused by an unauthorized disclosure, plus  
16 costs and reasonable attorney fees if the person:

17                   (1) negligently or intentionally requests or  
18 discloses information in the individual's medical record in  
19 violation of the provisions of the Electronic Medical Records  
20 Act;

21                   (2) forges a signature on an authorization  
22 form or materially alters the authorization form of the  
23 individual without the individual's consent; or

24                   (3) obtains an authorization form or  
25 information in the individual's medical records under false

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1 pretenses.

2 C. An individual is entitled to receive  
3 compensatory damages plus costs and reasonable attorney fees if  
4 a health information exchange maintaining a record locator  
5 service, or a person maintaining a record locator service for a  
6 health information exchange, negligently or intentionally  
7 violates the provisions of the Electronic Medical Records Act.

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